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IN THE
COURT OF APPEALS OF INDIANA

VERLE A. KERSEY,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 55A01-0605-CR-177

APPEAL FROM THE MORGAN CIRCUIT COURT
The Honorable Matthew G. Hanson, Judge
Cause No. 55C01-0503-FA-102

May 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Verle Kersey challenges a number of evidentiary rulings in his trial for child molesting. The trial court was within its discretion to exclude a journal Kersey kept, testimony of a witness who violated a separation order, and evidence the victim had previously reported molestation by someone else. We accordingly affirm his convictions.

The State asserts on cross-appeal the court should not have merged Kersey's two Class B felony convictions and his Class C felony conviction into the conviction of Class A felony child molestation, as convictions on all four counts would not violate double jeopardy. The record reflects the trial court's "merger" referred only to concurrent sentencing, and the State does not argue such sentencing was an abuse of discretion. We accordingly decline the State's invitation to "remand with instructions to impose sentence," (Br. of Appellee at 8), on the other three counts.

We affirm.

FACTS AND PROCEDURAL HISTORY

In December 2004, police were questioning C.B., then fifteen years old, about an offense he was suspected of committing. During that questioning C.B. reported Kersey had molested him. Kersey was charged with four counts of child molesting alleging he had molested C.B. over a period of about seven years starting when C.B. was six or seven. Kersey was friends with, and sometimes worked for, C.B.'s father. Kersey occasionally lived with C.B.'s father and stepmother and would sometimes baby-sit for C.B. C.B. testified Kersey had molested him while Kersey was at C.B.'s father's home and when C.B. visited his father's worksite.

DISCUSSION AND DECISION

1. Exclusion of Journal

Kersey requested production of a journal he had written and the police had seized. The State maintained it could not locate the journal, but on the Friday before trial the State “discovered,” (Tr. at 71), it at the Martinsville Police Department. The trial court told Kersey the journal would be excluded if Kersey wanted.

On the day of trial Kersey produced a second journal his father had given counsel during the prior week. Kersey wanted both volumes admitted, but the State moved to exclude the second journal because of the late discovery. Kersey then moved to exclude the first journal. The court granted both motions. Kersey made no offer of proof concerning the journal he wanted admitted.

Decisions regarding discovery matters, including rulings on discovery violations, are within the broad discretion of the trial court as part of its inherent power to guide and control the proceedings. *Dylak v. State*, 850 N.E.2d 401, 406 (Ind. Ct. App. 2006), *trans. denied* 860 N.E.2d 590 (Ind. 2006). We may affirm the trial court’s ruling if it is sustainable on any legal basis in the record, even a reason not articulated by the trial court. *Id.* Due to the fact-sensitive nature of discovery matters, such a ruling is cloaked on appeal with a strong presumption of correctness. *Id.*

Indiana Evidence Rule 103 provides in pertinent part that error may not be predicated on a ruling that excludes evidence “unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by a proper offer of proof” The purposes of an offer of proof are to convey the substance of the

evidence and to provide the trial judge the opportunity to reconsider the evidentiary ruling. *State v. Wilson*, 836 N.E.2d 407, 409 (Ind. 2005), *reh'g denied*. It also preserves the issue for review. *Id.* To accomplish these two purposes, an offer of proof must allow the trial court to determine whether the evidence is admissible and must allow an appellate court to review whether trial court's ruling was error and, if so, whether any error was prejudicial. *Id.* An offer of proof should indicate the facts sought to be proved and establish the competency and relevancy of the evidence offered.

As there was no offer of proof, the record before us does not permit our review of the competency and relevancy of the journal Kersey wanted admitted. We are therefore unable to address that allegation of error.

2. Striking of Testimony

Prior to trial the court granted the State's request for a separation-of-witnesses order. Kersey called his cousin, Rhonda Horton, as a character witness. After she testified, she revealed she had talked to her uncle after he had testified. The court granted the State's motion to strike her testimony and the jury was admonished to disregard her testimony.

We need not address Kersey's allegation the court abused its discretion in excluding Horton's testimony, as the record does not reflect, nor does Kersey argue, he was prejudiced by the exclusion of the testimony. Errors in the admission or exclusion of evidence are disregarded as harmless unless they affect the substantial rights of a party. Ind. Trial Rule 61; *Pruitt v. State*, 834 N.E.2d 90, 117 (Ind. 2005), *reh'g denied, cert. denied* __ U.S. __, 126 S.Ct. 2936 (2006). To determine whether an error in the

introduction of evidence affected a defendant's substantial rights, a reviewing court considers the probable impact of that evidence on the jury. *Id.*

Horton was one of eight character witnesses Kersey called, and the transcript reflects her testimony was in relevant part cumulative of that offered by the other character witnesses. Our courts have

upheld disqualifications where the witness' testimony would have been cumulative or inadmissible. *Rinard v. State* (1976), 265 Ind. 56, 351 N.E.2d 20, 25 (no error in trial court's exclusion of witness where testimony would have been cumulative and repetitious). In these instances, the rationale for excluding the witness is that the defendant suffered no prejudice because the witness' testimony was not crucial.

Smiley v. State, 649 N.E.2d 697, 700 (Ind. Ct. App. 1995), *trans. denied*. Kersey has not demonstrated he was prejudiced by the trial court's decision to exclude Horton's testimony.

3. Exclusion of Evidence of Prior Molestation

The State alleged Kersey had molested C.B. between 1996 and November 2003, but C.B. apparently did not report the molestation until his interview with police in December 2004. The State pointed out to the jury several times during trial that C.B. was testifying in front of adults about various sexual activities with another male, and it asked the jurors to consider "whether that is an easy allegation to make from that seat." (Tr. at 257.)

Kersey wanted to elicit testimony C.B. had previously reported to his parents that he had been molested by another boy. Kersey asserts evidence C.B. had reported the other molestation but had not reported being molested by Kersey would "combat the

[State's] erroneous attempt to bolster C.B.'s testimony, and . . . impeach him." (Br. of Appellant at 11.).

The decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal. *Carpenter v. State*, 786 N.E.2d 696, 702 (Ind. 2003). We will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. *Id.* An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law. *Id.* at 703.

In a discussion outside the presence of the jury, the judge expressed concerns about whether evidence of prior molestation would be impermissible under the Rape Shield statute. He then allowed Kersey to ask C.B.'s father whether C.B. had reported any crimes had been committed against him between 1994 and 2002. C.B.'s father responded "not to me personally, no." (Tr. at 416.) Kersey's counsel was asked whether he wanted to present that question before the jury, and counsel responded, "Well, no, not of this witness." (*Id.* at 418.)

Kersey then tried to ask C.B.'s father whether he had heard about such allegations from C.B.'s mother. The court did not allow that question because it would elicit hearsay. Neither party called C.B.'s mother as a witness.

Kersey declined to elicit before the jury testimony from C.B.'s father about whether C.B. had reported any prior crimes against him, and Kersey did not attempt to elicit such testimony from C.B.'s mother. Nor does Kersey argue on appeal the trial court erred to the extent it characterized the testimony of C.B.'s father as inadmissible

hearsay. We accordingly cannot say the trial court abused its broad discretion in declining to admit hearsay evidence regarding whether C.B. had reported being molested by someone other than Kersey.

4. Cross-appeal

The State argues on cross-appeal the trial court should not have merged the two Class B felony convictions and the Class C felony conviction into the conviction of Class A felony child molestation, as the charges were supported by separate acts and separate evidence even though the period during which the acts occurred “largely overlapped.” (Br. of Appellee at 21.)

Kersey did not file a reply brief or otherwise respond to the State’s cross-appeal. Where an appellant does not respond to a cross-appeal, the cross-appellant may prevail if its brief presents a *prima facie* error. *In re D.L.*, 814 N.E.2d 1022, 1029 (Ind. Ct. App. 2004), *trans. denied sub nom. Lewis v. Marion County OFC*, 822 N.E.2d 984 (Ind. 2004). *Prima facie* error is error “at first sight, on first appearance, or on the face of it.” *Id.*

Even under that standard of review, we must decline the State’s invitation to “reinstate [Kersey’s] other three convictions,” (Br. of Appellee at 24), as it does not appear those convictions were vacated.

In its abstract of judgment, the court noted Kersey had been found guilty of Count I, child molesting, and the three other counts. For counts two, three, and four, it stated “crt. finds *sentence* merges with Ct. I.” (App. at 12) (emphasis supplied). At the sentencing hearing the court noted the four counts involved essentially the “same time line,” (Tr. at 821), and the dates of the acts “were all pretty sketchy . . . none of those

dates were absolutely proved to a point that I believe that any of these can stack.” (*Id.* at 822.) The court went on to say:

[Count I] handles this best regarding the time lines and . . . the Court is going to do *no sentencing action* as to II, III, and IV and strictly rely on [Count I] for purposes of *taking care of the sentence* in this Court so there will be no further action on Counts II, III, and IV as they encompass similar or the same time lines, close enough in this Court’s mind, such that Count I *can handle the appropriate time* for rehabilitative purposes.

(*Id.* at 822-23) (emphases supplied). The court then went on to weigh aggravating and mitigating circumstances. Afterward, the court stated it had “accepted the jury’s findings of guilty to Count I, II, III, and IV – we’ll not be taking action *for sentencing purposes* on II, III, or IV.” (*Id.* at 825,) (emphasis supplied).

The court’s references to the similar time lines involved in the four counts suggest it perceived double jeopardy concerns that might necessitate vacation of some of the convictions. However, the State has directed us to nothing in the record that explicitly indicates the court’s purported “merger” had the effect of vacating any convictions or that it represented anything other than the court’s explanation for the imposition of concurrent sentences.¹

Our Indiana Supreme Court so interpreted a similar sentencing statement in *Kincaid v. State*, 837 N.E.2d 1008, 1010 n.1 (Ind. 2005). There the trial court imposed concurrent sentences of 20 years on each count and ordered that the convictions “merge.” “We infer that the trial court meant by this to enter judgment of conviction on both counts

¹ The Table of Contents for Kersey’s Appendix refers to an “Order RE: Sentencing on Counts II, III, and IV” on p. 15. There is no page 15 in Kersey’s appendix, and the State apparently did not provide a supplemental appendix to include that document. We decline to presume the trial court would issue a “sentencing” order with regard to convictions that did not exist after the “merger.”

and sentence Kincaid to 20 years on each count, the two sentences to be served concurrently.” *Id.* Similarly, in *Berry v. State*, 703 N.E.2d 154, 159 (Ind. 1998), the trial court sentenced Berry to sixty years for murder and twenty-five years for arson, then added that the sentences would “merge.” Our Indiana Supreme Court noted: “A more proper way to describe the trial court’s final determination would have been to say that Berry would serve the terms ‘concurrently’ . . . the court was within its discretion in determining that Berry would serve his sentences for two separate crimes at the same time.” *Id.*

We affirm the trial court’s judgment.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.